89- 1394

Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

NICHOLAS PENA,
Petitioner/Appellant,

vs. Case No.: _____

JOHN F. NICHOLS,
Oakland County Sheriff,

Defendant/Appellee,
_____/

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

NICHOLAS PENA
PETITIONER PRO SE
c/o H. WALLACE PARKER
1275 S. Woodward Avenue, Suite 200
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Questions Presented For Review

1. In an extradition proceeding, is the asylum state, bound to arrest and extradite a person described in the extradition documents even though the person arrested and extradited is not charged with a crime in the demanding state, because there is no law or statute in the demanding State which defines as a crime, the facts described in the extradition documents assuming these facts to be sufficient.

2. In issuing a warrant of arrest for extradition purpose, how can there be a reasonable ground to believe that a crime has been committed if there is no law or statute in the demanding state which defines as a crime, the facts stated in the extradition documents, assuming these facts to be sufficient.

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A. Opinion of the Court of Appeals

The United States Court of Appeals Ordered Appellant's extradition to the State of Texas even though Appellant is not charged with a crime in the State of Texas.

The opinion of the Court of Appeals for the Sixth Circuit is attached as Appendix "A".

B. Jurisdictional Basis

The instant case was decided and filed by the United States Court of Appeals for the Sixth Circuit on October 12, 1989.

The jurisdiction of the Court is invoked pursuant to 28 USC §1254(1) which authorized the Supreme Court to review the judgment of the Court of Appeals by certiorari.

C. Issues

1. In an extradition proceeding, is the asylum state bound to arrest and extradite a person described in the extradition documents, even though the person arrested and extradited is not charged with a crime in the demanding state, because there is no law or statute in the demanding State which defines as a crime. The facts described in the extradition documents assuming these facts to be sufficient.

2. In issuing a warrant of arrest for extradition purpose, how can there be a reasonable ground to believe that a crime has been committed if there is no law or statute in the demanding state which defines as a crime, the facts stated in the extradition documents, assuming these facts to be sufficient.

D. Applicable Constitutional Provision

1. Article IV, Section 2, of the United States Constitution.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

2. The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The Fifth Amendment to the United States Constitution:

No person shall ...be deprived of life, liberty, or property, without due process of law; ...

4. The Fourteenth Amendment to the United States Constitution:

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

E. Statement of the Case

On March 14, 1987, Appellant transported marijuana in Oakland County, Michigan. On July 20, 1987, he pled guilty to possession

with intent to deliver marijuana in Oakland County Circuit Court. He was sentenced to nine(9) months imprisonment in the County Jail with an opportunity for work release while confined. Appellant received a credit of one (1) day for time served.

On July 9, 1987, the Governor of the State of Michigan issued a warrant for Appellant's arrest and extradition to the State of Texas to answer to the charge of "engaging in organized criminal activity" on or about April 14, 1987, in Navarro County. The Oakland County Circuit Court granted Appellant's request for a Writ of Habeas Corpus Staying extradition in an Order dated September 8, 1987. The Court ruled that the Michigan warrant, on its face, failed to meet the requirements of the Uniform Criminal Extradition Act. Appellant was also released from custody.

On September 8, 1987, Appellant was charged in the State of Texas with the crime of "engaging in organized criminal activity ... by intentionally committing an act in the State of Michigan with intent that said act result in a crime..." in Texas. Subsequently, the Michigan governor issued a second Warrant for Appellant's arrest and extradition on September 22, 1987.

On January 12, 1988, the Oakland County Circuit Court ordered that the second Michigan Warrant be executed. However, Appellant was released on bond with the Order of extradition Stayed pending appeal. In a standard Order dated March 31, 1988, the Michigan Court of Appeals denied Appellant's Complaint for Writ of Habeas Corpus and motion for Preliminary Injunction. The Michigan Supreme Court also denied leave to appeal and a preliminary injunction in a standard order dated June 28, 1988. Appellant's Motion for Reconsideration was denied on September 7, 1988.

On August 22, 1989 the United States District Court for the Eastern District of Michigan denied Appellants application for Writ of Habeas Corpus. On October 12, 1989, the Court of Appeals for the Sixth Circuit denied Appellants application for Certificate of probable cause and for writ of Habeas Corpus.

F. Argument

The instant case falls within the purview of Rule 17 subdivision 1 paragraph (c) of the Supreme Court Rules, 28 USC because the Court of Appeals decided an important question of constitutional law which has not been but shouid be settled by

this Court.

Appellant is not asking this Court to examine the facts constituting probable cause because the holding of this Court in Michigan v Doran, 439 US 282 (1978), is correct insofar as it is applied to question of fact. The question which Appellant request this Court to resolve is whether a Criminal Law or statute in the State of Texas has been violated by Appellant assuming the facts stated in the extradition documents to be sufficient to constitute probable cause. This Court must decide this issue because of the following reasons:

a. the Fourth Article of the Constitution requires that only those charged with a Crime can be extradited. In order to be considered "charged with a crime" within the meaning of Article IV, there must be a law, or statute in the demanding state which defines and punishes the act as a crime.

b. the fourth amendment requires probable cause for issuance of a warrant of arrest. There is no probable cause that a crime has been committed if there is no law that defines as a crime the facts constituting the violation. The warrant of arrest issued by the Governor of the State of Michigan must therefore be subject to the fourth amendment scrutiny.

c. the due process clause of the fifth and fourteenth amendments require that before an act can be punished, there must be a law or statute which defines and punishes the act as a crime which satisfies the due process requirement.

d. the State and Federal Court must decide pursuant to Article IV, and the Fourth, Fifth and Fourteenth amendments, whether there is a law or statute enforced in the demanding state that define as a crime the act charged, otherwise, any person can be extradited to any state in the U.S. simply by stating facts sufficient under the holding in Doran supra and stating that said facts violates the law even though in reality, there is no such law, or the act is not covered under the law or the law is unconstitutional

e. MCL 790.(3a) requires that a person to be extradited must be charged with having committed an act in the asylum state coupled with an intent that such act result in a crime in the demanding state. In order to determine whether the act "result in a crime in the demanding state," there must be law or statute

which punishes the act as a crime.

In order to determine whether Appellant is charged with a crime in the State of Texas, it is therefore imperative to determine whether there is law or statute in the State of Texas which defines and punishes as a crime, the acts of Appellant as stated in the extradition documents. Section 71.01 and 71.02 of Texas Panel Codes states in pertinent part:

"Section 71.01 Definitions

In this chapter

(a) "Combination" means five or more person who collaborate in carrying on criminal activities,although:"

1....

2....

3....

4....

(b) "Conspires to commit" means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them perform an overt act in pursuant to the agreement. An agreement constituting conspiring to commit

may be inferred from the acts of the parties.

Section 71.02 Engaging in Organized Criminal Activity

(a) A person commits an offense if, with the intent to establish, maintain or participate in a combination or in the profits of a combination, he ~~commits~~ or conspires to commit one or more of the following.

1....

2....

3....

4....

5....

The Bill of Indictments states:

"Defendant, on about the 14th day of April in the year of our lord One Thousand Nine Hundred and Eight Seven. ...with intent to establish, maintain and participate in a combination... conspires to commit the aggravated offense of unlawful possession of a usable quantity of marijuana ...with W.T. Brown, Nickey Dale Rutledge, Freddie Castillo and Ysidro Castillo Sr. and then and there, agree among themselves and

with each other to engage in conduct constituting said offense. ...and in pursuance of such agreement and in furtherance thereof, said Nicholas Pena, W.T. Brown, Nickey Dale Rutledge, Freddie Castillo, and Ysidro Castillo Sr., performed overt act as follows":

(1) On or about March 14, 1987, in Oakland County, Michigan, W.T. BROWN allowed his vehicle to be used for the transportation of a usable quantity of marijuana.

(2) On or about March 14, 1987, in Oakland county, Michigan, NICHOLAS PENA transported a usable quantity of marijuana in W.T. BROWN"S vehicle.

(3) On or about March 25, 1987, in Ellis County, Texas, NICKEY DALE RUTLEDGE and FREDDIE CASTILLO, participated in a telephone conversation wherein NICKEY DALE RUTLEDGE and FREDDIE CASTILLO discussed the delivery of a usable quantity of marijuana.

(4) On or about April 14, 1987, YSIDRO CASTILLO, SR., in Navarro County, Texas, knowingly and intentionally possessed records of transactions involving the purchase and sale of marijuana.

(5) On or about April 14, 1989, YSIDRO CASTILLO, SR.,

in Navarro County, Texas, knowingly and intentionally possessed a usable quantity of marijuana in an amount less than 2,000 pounds but more than 200 pounds."

A close examination of the bill of indictment not only indicates deceit and fraud on the part of the prosecutor from Navarro County, state of Texas, it also indicates a clear example of persecution. The bill of indictment states that on April 14, 1987, NICHOLAS PENA conspired with W.T. BROWN and in pursuant to and in furtherance of said conspiracy, he agreed on April 14, 1987 to commit a crime on March 14, 1987. (Conspiracy this month to commit a crime last month or conspiracy today to commit a crime yesterday)

Instead of fixing the date of the conspiracy as March 14, 1987, the date when NICHOLAS PENA transported marijuana in Michigan using W.T. BROWN"S truck, the prosecutor for Navarro County, State of Texas fixed the date of conspiracy as April 14, 1987. The reason for this is crystal clear. Although there might have been a conspiracy on March 14, 1987 between Appellant and W.T. BROWN, section 71.02 of Texas Penal Code "engaging in organized criminal activity" was not violated on March 14, 1987 because there was no combination

of five or more persons as defined in section 71.01 (a).

Thinking that he can circumvent the law, the prosecutor for Navarro County, state of Texas fixed the date of conspiracy as April 14, 1987. But this is not without legal obstacle.

Although there might have been a combination on April 14, 1987, there was no conspiracy because under section 71.01 (b) of Texas Penal Code, a conspiracy requires the commission of an overt act in pursuant to and in furtherance of the conspiracy. To establish an overt act, the prosecutor invented an indictment unheard of and unknown, to the civilized world. The prosecutor stated that Appellant conspired with W.T. Brown on April 14, 1987 and in pursuant to and in furtherance of said conspiracy, Appellant on April 14, 1987 agreed to perform an overt act on March 14, 1987. (Conspiracy today to commit a crime yesterday).

Nothing is more clear than to say that the act committed by Appellant in Michigan on March 14, 1987 is not punishable under section 71.02 of the Texas Penal Code. Such an act preceded by one month, the alleged conspiracy and for this reason, it cannot be considered in pursuant to nor in furtherance of the conspiracy. The phrase "conspires to commit" implies a

future act. It is legally impossible to conspire to commit an act which has already been committed. It has been held in the following cases that where there is no law which define an act as a crime or when the act does not fall within the provision of the law, no crime is committed.

Before one may be punished it must appear that his case is plainly within a statute, as there are no constructive offenses. Nelson v U. S., 1961, 288 F.2d 376, 109 U.S. App. D.C. 392

A criminal law is not to be read expansively to include what is not plainly embraced within language of the statute since purpose fairly to apprise men of the boundaries of prohibited action would then be defeated. Kordel v U.S., Ill.1948, 69 S. Ct.106,335 U.S.345, 93 L.Ed. 52, rehearing denied 69 S.Ct.298 335 U.S. 900, 93 L.Ed. 435, rehearing denied 69 S.Ct. 513 336 U.S. 911, 93 L.Ed.1075.

An accused cannot be guilty of offense which does not exist as a matter of law nor vest in District court jurisdiction to impose judgment and sentence on plea of guilty to indictment for crime

not existing under federal laws. U.S. v Gallagher, D.C.Pa 1950, 94 F.Supp.640.

Statutes creating and defining crimes cannot be extended by intendment and no act however wrongful can be punishable under a statute unless it comes clearly within its terms. U.S. v Viola, D.C.Pa 1954, 126.F.Supp.718.

Statutes creating and defining crimes cannot be extended by intendment, and no act, however wrongful, can be punished under a statute unless clearly within its terms, and there can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the pertinent statute. U.S. v Jacobs, D.C.Wis.1953, 113 F.Supp.203 appeal dismissed 74 S. Ct. 288, 346U.S. 892, 98 L.Ed.394. There can be no constructive criminal offenses, and before a person may be punished, the charge against him must be plainly and unmistakably within a statute. U.S. v Jones, D.C.Fla.1952, 108F.Supp. 266, cause remanded 73 S.Ct. 759, 345 U.S. 377, 97 L.Ed. 1086, reversed on other grounds 207 F.2d 785.

Whether it is possible to commit the crime of "engaging in organized criminal activity" in the State of Texas by conspiring today to commit a crime yesterday, there is no law or statute and there is no precedent in the statute books.

G. Conclusion

In an extradition proceeding, when the issue raised is one of fact, that is, whether the fact stated in the extradition documents are sufficient on its face, the Court of the asylum state, may exercise restraint, thus leaving this issue to be litigated in the demanding state, Michigan v Doran, Supra.

When however the issue is one of constitutional law, that is, whether there is a law or statute in the demanding state which define as a crime the facts stated in the extradition documents, assuming them to be sufficient, Article IV of the constitution and the Fourth, Fifth and Fourteenth amendments mandate the state and federal courts to resolve this issue as a condition precedent to extradition. To hold otherwise would make the constitution useless at a time when it is most needed.

An act is not criminal unless there is a law that defines and punishes the act as a crime. This maxim is universally

accepted. There is no law or statute in the state of Texas which define the crime of "engaging in organized criminal activity" as committed by conspiring today to commit a crime yesterday." Said law exist only in the mind of the prosecutor. Based on the foregoing, Appellant is "not charged with a crime" in the State of Texas as the phrase is understood within the context of Article IV. The warrant of arrest issued by the Governor of the State of Michigan is void since in the absence of a criminal law or statute, there will be no probable cause that a crime has been committed pursuant to the Fourth amendment. For the same reason, Appellants due process right under the Fifth and Fourteenth amendments invalidates the whole extradition proceeding.

The greatest irony in this case is that the Michigan Supreme Court in the case of Duer v Newago Sheriff, 420 Mich 440 (1984) once protected a citizen from being extradited to the State of Maryland holding that the act committed by Defendant in Michigan was not intended to result and did not result to a crime in the State of Maryland. When presented with the same issue in the instant case, the Michigan Supreme Court without reversing Duer Supra held that it is for the Texas Court to

resolve this issue.

RELEIF REQUESTED

WHEREFORE, Appellant prays that an order be entered declaring as void the extradition documents from the State of Texas and declaring as void, the warrant of arrest issued by the Governor of the State of Michigan.

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Bloomfield Hills, Michigan 48013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NICHOLAS PENA,

Petitioner,

v. CIVIL ACTION NO. 88CV-73727-DT

HONORABLE JOHN FEIKENS

JOHN F. NICHOLS,

Respondent.

_____/

ORDER OF DISMISSAL

Petitioner, Nicholas Pena, has filed this pro se application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On July 20, 1987, he pled quilty to pssession with intent to deliver marijuana in Oakland County Circuit Court. He was sentenced to nine months imprisonment in the county jail with an opportunity for work release while confined. Petitioner received a credit of one day for time served. The Court also stated that it would suspend ninety days from the sentence if Petitioner paid $400 in court costs. (Docket No. 87-79599-FH).

On July 9, 1987, the Governor of the State of Michigan

issued a warrant for Petitioner's arrest and extradition to the State of Texas to answer to the charge of "engaging in organized criminal activity" on or about April 14, 1987 in Navarro County. (Response, Appendix A). The Oakland County

Circuit Court granted Petitioner's request for a writ of habeas corpus staying extradition in an order dated September 8, 1987. The Court ruled that the Michigan warrant, on its face, failed to meet the requirements of the Uniform Criminal Extradition Act. (Docket No. CR87-79599-FH). Petitioner was also released from custody. (Petition, p. 2).

On September 8, 1987, the Governor of the State of Texas issued a new warrant for Petitioner's arrest and extradition from the State of Michigan. Petitioner was charged more specifically with "engaging in organized criminal activity. . .by intentionally committing an act in the State of Michigan resulting in said crime. . ." in the State of Texas. (Petitioner's Brief, Exhibit F). Subsequently, Michigan's Governor issued a second warrant for Petitioner's arrest and extradition on September 22, 1987. (Response, Appendix B). On January 12, 1988, the Oakland County Circuit Court ordered that the second Michigan warrant

be executed. However, Petitioner was released on bond with the order of extradition stayed pending appeal. (Docket No. 87-82579-FH). In a standard order dated March 31, 1988, the Michigan Court of Appeals denied Petitioner's complaint for writ of habeas corpus and motion for preliminary injunction. (Docket No. 106185). The Michigan Supreme Court denied leave to appeal and a preliminary injunction in a standard order dated June 28, 1988. Petitioner's motion for reconsideration was denied on September 7, 1988. (Docket No. 82956).

Petitioner filed the instant application for habeas relief on September 14, 1988. Although he is presently free on bond, Petitioner remains "in custody" for purposes of habeas corpus proceedings because his freedom of movement is subject to restraint by state judicial officers. See Hensley v. Municipal Court, 414 U.S. 345, 351 (1973). Petitioner challenges his pending extradition to the State of Texas and claims that his liberty is being illegally restrained because:

A. The January 12, 1988 Oakland County Circuit Court order upholding the second Michigan arrest and extradition warrant violated the principle of res judicatainasmuch as the same issue of fact and law had been finally adjudicated by the Circuit Court on September 8, 1987;

B. The March 31, 1988 Michigan Court of Appeals order denying a writ of habeas corpus violated the principle of res judicata because the Circuit Court had already finally adjudicated the same issue of fact and law on September 8, 1987;

C. The bill of indictment upon which the Michigan warrant was based did not charge Petitioner with having committed a felony or other crime in the State of Texas;

D. Petitioner has never been in the State of Texas and the bill of indictment failed to state that he was in the State of Texas when the alleged offense was committed;

E. The Michigan and United States constitutional prohibition against double jeopardy was violated by the Oakland County Circuit Court, Michigan Court of Appeals and Michigan Supreme Court orders dated January 12, 1988, March 31, 1988, and June 28 and September 7, 1988, respectively, because Petitioner was ordered extradited to face charges in the State of Texas for the same offense to which he had already pled quilty in the Oakland County Circuit Court on July 20, 1987;

F. The March 31, 1988 Michigan Court of Appeals order deprived Petitioner of his due process rights because the respondent never served Petitioner with a copy of the answer to the petition for writ of habeas corpus;

G. Petitioner is not a fugitive from the State of Texas; and

H. Petitioner did not commit an act in the State of Michigan coupled with an intent that the act result in a crime in the State of Texas.

Before a state prisoner is entitled to habeas review, he must have exhausted his available state remedies. Ex parte Royall,

117 U.S. 241 (1886). Under 28 U.S.C. §2254(b) and (c), he must have "fairly presented" the substance of each federal constitutional claim[1] to the state appellate courts before raising it in a petition for a writ of habeas corpus. Picard v. Connor, 404 U.S. 270, 276-**27?** (1971). As stated in Anderson v. Harless, 459 U.S. 4, 6 (1982), "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts. . . or that a somewhat similar state-law claim was made." A prisoner challenging a Michigan conviction is required to have raised each such issue in both the Michigan Court of Appeals and the Michigan Supreme Court before seeking habeas relief in federal court. Dombroski v. Johnson, 488 F.2d 68, 70 (6th Cir. 1973); Winegar v. Corrections Department, 435 F.Supp. 285, 289 (W.D. Mich. 1977), aff'd, 582 F.2d 1281 (6th Cir. 1978).

In Rose v. Lundy, 455 U.S. 509 (1982), the Supreme Court held that 28 U.S.C. § 2254(b) and (c) requires a federal district court to dismiss a petition for a writ of habeas corpus containing

[1]A writ of habeas corpus is available to a person in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

any claims that have not been exhausted in the state courts, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510.[2]

The Court has carefully reviewed the state court records and finds that the petition must be dismissed. Petitioner has failed to adequately exhaust his state court remedies. Although he presented claims A, C, G, and H to both the Michigan Court of Appeals and the Michigan Supreme Court, Petitioner did not raise them as federal constitutional questions. Those four issues were raised as purely state law claims with no reliance on either state or federal cases containing federal constitutional analysis. Petitioner never presented claims B, D, and F to the Michigan Court of Appeals. He did raise those three issues before the Michigan Supreme Court. However, claims B and

[2]In Rose, supra, the Court also discussed the possible consequences of these choices. The plurality indicated that under 28 U.S.C. § 2254 Rule 9(b), "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal (with prejudice) of subsequent federal petitions." Id. at 521. (O'Connor, J., with three justices concurring).

D were raised as questions of state law and claim F was not supported by any case law of any kind. The Court finds that only claim E was adequately exhausted in both state appellate courts because the issue of double jeopardy inherently calls to mind a specific right protected by the Fifth Amendment of the United States Constitution.

In order to satisfy the exhaustion requirement, a prisoner must have "fairly presented" the same legal claim to the state courts that he presents in his federal habeas petition. Petrucelli v. Coombe, 735 F.2d 684, 687 (2d Cir. 1984), citing Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982) (en banc), cert. denied, 464 U.S. 1048 (1984). Because non-constitutional claims are not cognizable in federal habeas corpus proceedings, Smith v. Phillips, 455 U.S. 209, 221 (1982), a habeas petition must put state courts on notice that they are to decide federal constitutional claims. Adequate notice to the state courts that they are to decide federal constitutional claims at least includes:

a) reliance on pertinent federal cases employing constitutional analysis,

b) reliance on state cases employing constitutional analysis in like fact situations,

c) assertion of the claim in terms so particular as to call to

mind a specific right protected by the Constitution, and

d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye, 696 F.2d at 194.

Reliance on generalized, catch-all phrases merely alleging a deprivation of due process or fair trial under the United States Constitution is not sufficient to apprise state courts of the constitutional theory to be relied upon at appellate review, especially where the only legal theory presented to state courts is predicated upon state law. Franklin v. Rose, 811 F.2d 322 (6th Cir. 1987); Petrucelli, supra. This Court concludes that Petitioner did not adequately apprise the Michigan appellate courts that they were to decide federal constitutional questions as to claims A, B, C, D, F, G, and H. Accordingly,

IT IS ORDERED that the petition for writ of habeas corpus is DISMISSED.

_____

JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATED: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NICHOLAS PENA,
Petitioner,
v. CIVIL ACTION NO. 88CV-73727-DT
HONORABLE JOHN FEIKENS
JOHN F. NICHOLS,
Respondent.
_____/

JUDGEMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable John Feikens, United States District Judge, presiding and in accordance with the Order of Dismissal entered on _____, 1989,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same hereby is DISMISSED.

Dated at Detroit, Michigan, this _____day of _____, 1989.

DAVID R. SHERWOOD
CLERK OF THE COURT
By: _____
DEPUTY CLERK

APPROVED:

_____
JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

No. 89-2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS PENA,	)	
	)	
Petitioner-Appellant,	)	
	)	
v	)	ORDER
	)	
JOHN F. NICHOLS,	)	
	)	
Respondent-Appellee.	)	

Dated: November 9, 1989

Petitioner Pena appeals from the district court's judgment dismissing his petition for a writ of habeas corpus. 28 U.S.C. S 2254 (1982). The receipt of the certified record has been construed as an application for a certificate of probable cause. Fed. R. App. P. 22(b).

Pena is a resident of the State of Michigan. Pursuant to a warrant from the Governor of Michigan, Pena has been ordered extradited to the State of Texas to face drug conspiracy charges. His habeas petition attacks the extradition proceedings.

The district court dismissed the petition for failure to exhaust remedies. In its answer to the petition, the state conceded that state remedies had been exhausted. The exhaustion rule is not a jurisdictional requirement. Strickland v Washington, 466 U.S. 668, 684 (1984). Therefore, the district court should not have dismissed the petition on the basis of failure to exhaust state remedies because the state conceded exhaustion.

Nevertheless, we will affirm the judgment of the district court. A decision below must be affirmed if correct for any reason appearing in the record, including a reason not considered by the district court. Russ' Kwik Car Wash Inc. v Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985) (per curiam). The scope of review of extradition decisions is limited. Michigan v Doran, 439 U.S. 282, 288-89 (1978). The court can only consider whether the extradition documents are valid on their face, whether the allegations state a crime in the requesting state, whether the petitioner is the person sought for the crime, and whether the petitioner is a fugitive. 439 U.S. at 289-90.

In this case, Pena has admitted that the documents are valid on their face and that he is the person sought by the State

of Texas. The copies of the indictments in the record show that they clearly allege that Pena has committed a crime in the State of Texas. Finally, even though Pena is not technically a fugitive, he does fall within the range of persons permitted to be extradited by virtue of a Michigan statute. Mich. Comp. Laws Anno. S 780.3a (West 1982); Eroh v Manistee County Sheriff, 86 Mich. App. 545, 550 (1978). Under the limited standard of review of extradition decisions, Pena is not entitled to relief.

The application for a certificate of probable cause is denied.

ENTERED BY ORDER OF THE COURT

CLERK